IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ATLANTIC CREDIT & FINANCE SPECIAL FINANCE UNIT, LLC,	)	
Plaintiff,	)	**Civil Action No. 7:00-CV-00846**
v.	)	**MEMORANDUM OPINION**
MBNA AMERICA BANK, N.A.,	)	**By: Samuel G. Wilson,**
	)	**Chief United States District Judge**
Defendant.	)	

This is an action brought by the plaintiff, Atlantic Credit & Finance Special Finance Unit, LLC, ("ACF"), against the defendant, MBNA America Bank, N.A., ("MBNA"), alleging breach of contract, fraud in the inducement, and unjust enrichment. The court has jurisdiction pursuant to 28 U.S.C. §§ 1332, 1348.[1] This matter is before the court on MBNA's motion to dismiss ACF's claims for fraud in the inducement and unjust enrichment. In the alternative, MBNA moves, pursuant to Federal Rule of Civil Procedure 12(f), to strike Count IV of the complaint, which sets forth ACF's claim for unjust enrichment. Finding that ACF has adequately stated claims for fraud in the inducement and unjust enrichment and that ACF's claim for unjust enrichment is not redundant, the court will deny MBNA's motion to dismiss and motion to strike.

I.

ACF is a credit and finance company, which purchases bad debts from various financial institutions at a discounted rate and then collects the debts. ACF entered into negotiations with MBNA, a credit card company in Delaware, to purchase a number of its charged-off bad debts (or

[1]ACF is a Virginia limited liability company having its principle place of business in Virginia. MBNA is a national banking association located in Delaware.

receivables). These negotiations resulted in a Loan Sale Agreement (the "Agreement"), dated March 20, 2000. Pursuant to the Agreement, on March 28, 2000, ACF purchased 1,622 receivables at the price of $0.0905 per $1.00 of outstanding principal balance, equaling $10,017,561.85 worth of receivables for a gross purchase price of $906,589.35, less commission.[2] Also pursuant to the Agreement, on May 9, 2000, ACF purchased an additional 1,653 receivables at the same price, equaling $10,001,478.77 of receivables for a gross purchase price of $905,133.83, less commission.

The Agreement includes a warranty as to MBNA's selection procedures, as well as a broad disclaimer as to the characteristics and value of the subject loans. Section 2.3 of the Agreement provides the warranty, which states:

> [t]he Seller agrees that in determining which charged off loans to sell as Additional Loans and which to retain, the Seller will not use selection procedures after charge off which would materially alter the character or nature of the pools of loans sold to the Buyer. The parties acknowledge that Seller's current policies and procedures shall not be deemed to constitute adverse selection procedures.

However, the warranty is vague because the Agreement lacks any definition or indication as to what the "Seller's current policies and procedures" were comprised of at the time the Agreement was executed by the parties.

In conflict with that vague warranty is Section 9.4 of the Agreement, which is entitled "Loans Sold As Is" and contains a broad disclaimer of any warranties relating to (1) "the marketability, value, quality or condition" of the loans, (2) "the validity, enforceability or collectibility" of the loans, (3) compliance of the loans with applicable laws, (4) "the accuracy or completeness of any information provided by the seller to the buyer," and (5) "any other matters

[2]A 2% commission was deducted from the gross purchase price to pay a broker.

pertaining to the loans."[3] Section 9.4 also disclaims any representations that were made prior to the execution of the Agreement and provides that ACF is relying on its own examination of the loans:

> Buyer acknowledges and agrees that buyer is purchasing the loans based upon buyer's independent examination, study, inspection and knowledge of the loans and that buyer is relying upon its own determination of the quality, value and condition of the loans and not on any information provided or to be provided by seller. Buyer acknowledges and agrees that any information provided or to be provided with respect to the loans was or will be obtained from a variety of sources and that seller has not made or will not be obligated to make an independent investigation or verification of such information and seller makes no representations as to the accuracy or completeness or [sic] such information. Buyer acknowledges and agrees that seller has not undertaken to correct any misinformation or omission of information which might be necessary to make any information disclosed to such buyer not misleading in any respect. . . . No event or condition shall entitle buyer to refuse to purchase a loan or to request seller to repurchase a loan, except as specified in this agreement.

Before executing the Agreement, ACF and Cargill Financial Services Corporation ("Cargill"), which partially financed ACF's purchase, engaged in due diligence to determine the quality and value of the receivables. This review included an analysis of a loan schedule, which contained information about the account debtors, date of charge-off, and historical payment information.

ACF, Cargill, and MBNA officers also had several conference calls regarding the transaction. In one conference call, Wes Schiffler of Cargill asked Gary Dastin of MBNA about MBNA's settlement policies and procedures, at which time Dastin allegedly indicated that MBNA engaged in settlement activity only through negotiations with individual debtors and did not engage in mass settlement activities. Richard Woolwine, the Chief Executive Officer of ACF,

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[3]All of Section 9.4 of the Agreement is in capital letters, with the exception of the first sentence; parts of that section are quoted here in lower case to assist readability.

requested that MBNA include the representation about settlement activities in the Agreement, but Dastin stated that such a representation was unnecessary because MBNA did not engage in any mass settlement procedures. Tom Hicks and David Ludwig of National Loan Exchange, which was MBNA's broker and agent, also allegedly represented to Woolwine during telephone conversations in February 2000 that MBNA did not engage in mass settlement activities. ACF asserts that it was induced to sign the contract based on MBNA's representations that it did not engage in adverse selection procedures[4] or mass settlement activity and that MBNA diverted ACF from conducting additional due diligence prior to signing the Agreement by making those representations.

After the transaction was complete, ACF learned from debtors that MBNA had engaged in adverse selection procedures and mass settlement offers, making both the probability of collecting the debts and the value of the receivables lower than if MBNA had not engaged in those practices. ACF filed this suit on October 31, 2000, asserting breach of contract, fraud in the inducement, and unjust enrichment. The action is now before the court on MBNA's motion to dismiss ACF's claims for fraud in the inducement and unjust enrichment. Alternatively, MBNA moves, pursuant to Federal Rule of Civil Procedure 12(f), to strike Count IV of the complaint, which sets forth ACF's claim for unjust enrichment.

II.

MBNA moves to dismiss, pursuant to Federal Rule of Civil Procedure 12(b)(6), Counts II

[4]"Adverse selection procedures" refers to the practice of creditors to evaluate the collectibility of bad debts prior to offering them to third parties such as ACF. One adverse selection procedure is the practice of conducting mass settlement activities prior to selling the receivables to third parties.

and III of the complaint, which set forth ACF's claims for actual and constructive fraud in the inducement. In order to state a claim for actual fraud in Virginia, a plaintiff must allege (1) a false representation, (2) of material fact, (3) made intentionally and knowingly, (4) with the intent to mislead, (5) justifiable reliance by the party misled, and (6) damages resulting from that reliance. See Bank of Montreal v. Signet Bank, 193 F.3d 818, 826 (4th Cir. 1999). Affirmative misrepresentations made recklessly can also form the basis for liability. Id.

Constructive fraud requires allegations of (1) a false representation, (2) of material fact, (3) made innocently or negligently, (4) with the intent that the person would act on this representation, (5) justifiable reliance by the party misled, and (6) damages resulting from that reliance. Id. at 826-27. Essentially, "[c]onstructive fraud differs [from actual fraud] only in that the misrepresentation of material fact is not made with the intent to mislead, but is made innocently or negligently." Hitachi Credit America Corp. v. Signet Bank, 166 F.3d 614, 628 (4th Cir. 1999).

MBNA argues that the complaint fails to state a claim in Counts II and III because the facts and circumstances set forth in the complaint do not support the fifth required element of actual and constructive fraud: justifiable reliance. MBNA first asserts that ACF's reliance on any representations regarding the quality or value of the loans was unjustified because ACF acknowledged in the Agreement that it would conduct its own independent examination of the loans. Generally, reliance is not justified if the party undertakes a full investigation of the misrepresented information or if the party makes a partial investigation and elects to rely on the information gained through that incomplete inquiry. Bank of Montreal, 193 F.3d at 828. However, "[w]hen the one inducing the other to enter the contract throws the other off guard or

diverts him from making the reasonable inquiries which usually would be made, . . . Virginia law will forgive an incomplete investigation." Id. at 828.

In the present case, the Agreement did indeed provide that ACF would conduct and rely on its own independent evaluation of the loans to determine the quality and value of what it was purchasing. However, when ACF contemplated the possibility that MBNA might use adverse selection procedures, MBNA allegedly reassured ACF that it did not engage in adverse selection procedures or mass settlement activity of any kind. These allegations, if proven, would support the element of justifiable reliance and, therefore, a claim for actual or constructive fraud because they indicate that MBNA intentionally diverted ACF officers from the truth in order to induce them to execute the Agreement. "[O]ne cannot, by fraud and deceit, induce another to enter into a contract to his disadvantage, then escape liability by saying that the party to whom the misrepresentation was made was negligent in failing to learn the truth." Bank of Montreal, 193 F.3d at 828 (quoting Nationwide Ins. Co. v. Patterson, 229 Va. 627, 331 S.E.2d 490, 492 (1985)).

MBNA also argues that ACF's reliance was unjustified because the Agreement contained broad disclaimers of any representations not included in the Agreement, including any oral statements that MBNA allegedly made to induce ACF's execution of the Agreement. However, broad disclaimers do not shield a seller from liability for fraudulent misrepresentations designed to induce the buyer to enter a contract. See id. at 830; Hitachi Credit America Corp. v. Signet Bank, 166 F.3d 614, 630-31 (4th Cir. 1999). "[A] buyer can recover for fraudulent inducement not only where the contract contains a general disclaimer of warranties and liabilities, but also where the contract contains specific disclaimers that do not cover the allegedly fraudulent contract-inducing

representations." Hitachi, 166 F.3d at 630-31. Thus, only where the disclaimer relates to the content of the misrepresentation does reliance upon the misrepresentation become unjustifiable. See id.; Bank of Montreal, 193 F.3d at 830.

Here, MBNA's alleged misrepresentation was that it did not engage in adverse selection procedures, including mass settlement activity. In contrast, Section 9.4 of the Agreement contains broad disclaimers of any warranties relating to the value, quality, or collectibility of the loans and the accuracy or completeness of any information that MBNA provided to ACF. However, there is no mention of adverse selection procedures or mass settlement activity.[5] Because these broad disclaimers do not relate to adverse selection procedures or mass settlement activity, the court cannot conclude that ACF's reliance on MBNA's alleged misrepresentations was unjustified. Consequently, the court finds that ACF has stated valid claims for actual and constructive fraud in the inducement.

III.

MBNA also moves to dismiss ACF's claims for actual and constructive fraud based on Federal Rule of Civil Procedure 9(b). Rule 9(b) requires that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed. R. Civ. P. 9(b). "The 'circumstances' required to be pled with particularity under Rule 9(b) are 'the time, place, and contents of the false representations, as well as the identity of the person

[5]Quite to the contrary, the Agreement provides a warranty in Section 2.3 that "Seller will not use selection procedures after charge off which would materially alter the character or nature of the pools of loans sold to the Buyer." That section also provides that "[t]he parties acknowledge that Seller's current policies and procedures shall not be deemed to constitute adverse selection procedures," but does not define of what those current policies and procedures are comprised.

making the misrepresentation and what he obtained thereby.'" Harrison v. Westinghouse Savannah River Co., 176 F.3d 776, 784 (4th Cir. 1999) (quoting 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure: Civil § 1297, at 590 (2d ed. 1990)).

Here, ACF's complaint meets the requirements of Rule 9(b). The complaint describes the false representations as follows:

> In mid-February 2000, during several telephone conversations among Mr. Woolwine of ACF, Wes Schiffler of Cargill, and Mr. Dastin of MBNA, Mr. Woolwine and Mr. Schiffler specifically asked Mr. Dastin about MBNA's settlement policies and procedures with respect to the subject receivables. Mr. Dastin represented to Mr. Woolwine and Mr. Schiffler during the telephone conversations that MBNA engaged in settlement activity only through negotiations with individual debtors. Mr. Dastin indicated that MBNA would consider settlements with individual account debtors based on the account debtor's request and their specific financial situation. Additionally, Mr. Hicks and Mr. Ludwig, acting as MBNA's agent, told Mr. Woolwine in telephone conversations in February that MBNA did not engage in mass settlement activities.

(Compl. at ¶ 16.) The complaint also states that, "[h]ad ACF known of these adverse selection procedures and settlement practices, it would not have purchased the portfolios at that price." (Id. at ¶ 20.) These allegations specifically set forth the time, place, and contents of the false representations, the identity of the people who made the statements, and the gain achieved by MBNA as a result of the statements. Consequently, the complaint meets the requirements of Rule 9(b).

IV.

MBNA also moves to dismiss ACF's unjust enrichment claim (Count IV), asserting that it should fail for the same reasons as the claims for fraud in the inducement, because the two claims are based on the same allegations. On the contrary, unjust enrichment provides an alternative cause of action based on equitable principles where an express contract is either non-existent or

fails from defects.[6] "The quasi-contract is a plaintiff's remedy at law when the facts establish that a defendant has been unjustly enriched at the expense of the plaintiff, but where the facts fail to establish that the parties established any form of agreement." Nossen v. Hoy, 750 F. Supp. 740, 744 (E.D. Va. 1990). To state a claim for unjust enrichment in Virginia, a plaintiff must allege three elements: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant knew that the plaintiff conferred the benefit; and (3) the defendant accepted or retained the benefit under circumstances that render it inequitable for the defendant to retain the benefit without paying for its value. See id. at 744-45.

Here, ACF has alleged that it provided a benefit to MBNA in the form of excess consideration (Compl. at ¶ 40), and MBNA's knowledge of the conferral of the benefit can be inferred through the general allegations of the complaint. In return, MBNA gave ACF a package of receivables that ACF claims are worth less than it paid for them. (Compl. at ¶ 39.) ACF further alleges that it would be unconscionable to allow MBNA to retain the excess consideration because MBNA obtained this enrichment unjustly through fraudulent misrepresentations, which were relied upon by ACF. (Compl. at ¶¶ 39-40.) These allegations adequately state a claim for unjust enrichment.

V.

[6]An unjust enrichment claim will fail as a matter of law where there is an express contract between the parties. "It is a well-settled principle under Virginia law that unjust enrichment claims arise only where there is no express contract." Lane Construction Co. v. Brown & Root, Inc., 29 F. Supp. 2d 707, 727 (E.D. Va. 1998), rev'd in part on other grounds, 207 F.3d 717 (4th Cir. 2000). Although ACF has alleged the existence of a written agreement between the parties in other counts of the complaint, it is proper to allege an alternative ground for recovery, which might provide a basis for relief should MBNA successfully attack the validity of the agreement. See Fed. R. Civ. P. 8(e)(2).

In the alternative, MBNA moves, pursuant to Federal Rule of Civil Procedure 12(f), to strike ACF's unjust enrichment claim (Count IV), because it is duplicative of the fraud in the inducement claims. See Fed. R. Civ. P. 12(f) (allows the court to strike from the pleadings any "insufficient defense or any redundant, immaterial, impertinent, or scandalous matter"). As discussed, Count IV of the complaint adequately sets forth an alternative cause of action for unjust enrichment, which is separate and distinct from ACF's claims for fraud in the inducement. As a result, the court denies MBNA's motion to strike.

VI.

For the reasons stated, the court denies MBNA's motion to dismiss and motion to strike. An appropriate order will be entered this day.

ENTER: This 4th day of June, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE

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ATLANTIC CREDIT & FINANCE)
SPECIAL FINANCE UNIT, LLC,)

Plaintiff,	)	**Civil Action No. 7:00-CV-00846**
	)	
v.	)	**ORDER**
	)	
MBNA AMERICA BANK, N.A.,	)	**By: Samuel G. Wilson,**
	)	**Chief United States District Judge**
Defendant.	)	

In accordance with the Memorandum Opinion entered this day, it is **ORDERED and ADJUDGED** that MBNA's motion to dismiss and motion to strike are **DENIED**.

ENTER: This 4th day of June, 2001.

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CHIEF UNITED STATES DISTRICT JUDGE